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No. 08-1212 (3)

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IN THE

Supreme Court of the United States

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Petitioners,

—v.—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition to the Petition raises distinctions between this case and other precedent, and even suggests that the case is not worthy of a writ of *certiorari* because almost all states, other than Louisiana, are required by statute to honor the obligations imposed by final judgments. While such arguments are revealing, they scarcely suggest that the disregard of final judgments will not be a recurring problem. Louisiana itself has already given rise to similar cases is a likely incubator of future cases.[1] In all events, the Brief in Opposition does little to address,

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[1] Louisiana state agencies and political subdivisions are subject to the same constitutional scheme on the enforcement of judgments through appropriations only. La. Const., Art. XII, §10(A), La. Const., Art. XII, §10(C). Like the State, Louisiana political subdivisions apparently are starting to ignore final judgments which they do not find convenient. *The Newman Marchive Partnership, Inc. v. City of Shreveport*, 962 So. 2d 1075, 1077-1078 (La 2007); *Newman Marchive P'ship v. Hightower*, 2009 U.S. Dist. LEXIS 8945 (W.D. La. Feb. 6, 2009). Refusals to satisfy judgments have not been limited to Louisiana. *Mandel v. Myers*, 29 Cal. 3d 531 (1981) (refusal to pay court awarded attorney's fees).

let alone illuminate, the constitutional issues presented by this case.

The important constitutional issues of federalism represented by this case could not be more starkly presented: First, where a state has given its legislature exclusive control over payment of final judgments against the state, and the legislature refuses to appropriate funds to pay that final judgment, what action should a sister state take when enforcement of that final judgment is sought in the sister state?

Several hundred years of uninterrupted Full Faith and Credit Law and several hundreds of years of constitutional law regarding enforcement of sister state judgments require that the judgment be enforced in the enforcing state in accordance with its enforcement procedures. *See*, Petition at 14-17, 21-26, *infra* at 8. Those hundreds of years of constitutional law precedent should have been adhered to by the New York Court of

Appeals, but instead were disregarded. Even were an exception to uniform prior rulings somehow justifiable, the question of whether to create a new rule inconsistent with this Court's uniform precedent, and the contours of such a rule, are matters of utmost significance to this Court, and should be ruled upon by this Court.

Second, where a state legislature or executive refuses enforcement of a final judgment, should a sister state enforce the judgment irrespective of the legislative/executive objection? Again, the command of the Full Faith and Credit law is "exacting," *Baker by Thomas v. GMC,* 522 U.S. 222, 232-33 (1998) and requires any final judgment of a sister state to be enforced. *See*, Petition at 14-17, *infra* at 9-10. The adherence to the rule of law requires no less.

Third, in deciding whether to enforce a foreign judgment, may a state apply a "comity" test, which

turns upon whether the judgment debtors were citizens of Louisiana or citizens of New York? Prior Full Faith and Credit cases expressly reject the notion that enforcing states have any flexibility in deciding whether to enforce a final judgment based on comity. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) ("Full Faith and Credit Clause . . . substituted a command for the earlier principles of comity"). *See*, Petition at 14-15, 26, *infra* at 11-12. Such an approach also is a clear violation of the Privileges and Immunities Clause of Article 4, Section 2 of the United States Constitution. *See*, Petition at 27-30, *infra* at 11-13. Contrary to defendants' assertion, that issue was raised by petitioner, both in the intermediate appellate court and in the New York Court of Appeals. *See*, Add. 1-4, and *infra*, at 9-10.

We address the issues raised by the Brief in Opposition more fully below.

1. The Brief in Opposition, like the Court of Appeals below, confuses Limitations on Enforcement of a Judgment with Limitations of the "Effect" of the Judgment for Full Faith and Credit Purposes

The Court of Appeals ruled that enforcement was excused in New York because the limitations on enforcement contained in Louisiana Constitution Art. XII §10(C) limit the "effect" of the Louisiana Judgment at issue, *see* Opinion of Court of Appeals, at 5a-6a.

There is no question that the Louisiana judgment is final under Louisiana law for *res judicata* purposes, *see* Petition at 17-21. The Brief in Opposition admits as much. Brief in Opp. at 4. The problem, as the New York Court of Appeals and the Brief in Opposition note, is that the sole means of enforcement is a legislative appropriation and the Louisiana legislature has refused to appropriate funds to pay the judgment. *See*, Brief in Opp. at 4. The Court of Appeals incorrectly concluded that as a result the "effect" of the judgment was limited

by the restriction on enforcement. *See,* Opinion of Court of Appeals at 5a-6a.

As we pointed out in the Petition at 16-17, however, the "same effect" language in the Full Faith and Credit cases refers to the same preclusive effect for *res judicata* purposes. *See, e.g., Baker by Thomas v. GMC,* 522 U.S. 222, 232-233 (1998); *Durfee v. Duke,* 375 U.S. 106, 109 (1963). For Full Faith and Credit purposes, it matters not at all that Louisiana law severely restricts the enforcement procedures available for final judgments against the state. As Justice Ginsburg stated in *Baker by Thomas*, "enforcement measures do not travel with the sister-state judgment as preclusive effects do . . ." *Id* at 358. Enforcement limitations, whatever their scope, are not relevant to the "preclusive effect" of the judgment, which is the only "effect" relevant to Full Faith and Credit analysis.

As a matter of Full Faith and Credit law, the enforcement limitations with respect to claims against the State of Louisiana are no more "baked" into the judgment itself (to use the Brief in Opposition's colorful phrase), than any other enforcement limitations are "baked" into any other judgments. Nor do they have any relevance for Full Faith and Credit purposes.

We do not argue, as the Brief in Opposition claims at 16, that this rule is a constitutional "command that New York courts must completely ignore the legal constraints of Louisiana law." (emphasis supplied). States could well adopt procedures that give effect to foreign state enforcement privileges and burdens. However, that is not what New York law does or what the New York Court of Appeals found in this case.

There can be no dispute that under New York law all foreign judgments which are entitled to Full

Faith and Credit, are enforced in accordance with New York law. *See*, New York C.P.L.R. Article 54; *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 331-32 (1946); Petition at 24-26 and cases cited. As the decision below makes clear, the Court of Appeals denied enforcement of the judgment because of its misapplication of the Full Faith and Credit Clause, and not because of any general application of foreign enforcement procedures.

2. **Even if the State Legislature Attempts to Nullify the Effect of a Final Judgment, the Full Faith and Credit Clause Requires Sister States to Recognize the Judgment**

Where a state legislature, as here, seeks to nullify a final judgment and enforcement is sought in a sister state, under existing law of this Court, the enforcing state has only one choice: the final judgment of the Court must be enforced. As Justice Ginsburg stated in *Baker by Thomas*, "regarding judgments,

however, the Full Faith and Credit obligation **is exacting**" and once a final judgment is rendered, it "qualifies for recognition throughout the land." *Baker by Thomas v. GMC*, 522 U.S. 222, 232-33 (1998) (emphasis supplied). *See, also, Franchise Tax Bd. v. Hyatt,* 538 U.S. 488, 494 (2003). The New York Court of Appeals itself stated an earlier opinion it clearly stated: "States enjoy no . . . flexibility in deciding whether they will recognize foreign judgments." In *Farmland Dairies v. Barber*, 65 N.Y. 2d 51, 58 (1985). "The Full Faith and Credit Clause . . . substituted *a command* for the earlier principles of comity." *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) (emphasis supplied).

Final judgments by sovereign courts with jurisdiction should be enforced, even where the legislature or the executive may prefer not to enforce it. That principle was established at the very formation of this Republic in *Marbury v. Madison*, 5 U.S. 137 (1803).

Justice Marshall referenced the historic precedent of compliance with court's judgments, well established even before 1803, and noted that the king himself "never fails to comply with the judgment of his court." *Id.* at 163. Justice Marshall forcefully concluded that a government that ignores judicial decisions does not deserve to be called "a government of laws and not of men." *Id.* There is no reason in law or in policy to defer to the inaction of the Louisiana legislature which seeks to undermine a final judgment.

3. The Court of Appeals Ruling Must be Overturned because it is clearly based on Applying a Different Rule with Respect to the Enforcement in New York of Louisiana Judgments depending on whether they were Obtained by New York Citizens or Citizens of Louisiana

The Court of Appeals is additionally in error because it clearly applied a different rule on the enforcement of a final judgment by these plaintiffs because they were citizens of Louisiana and not of New

York. The failure to apply the same remedies in favor of New York citizens and Louisiana citizens on enforcement of judgments in New York is undisputedly a violation of the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution. *See,* Petition at 27-30.

Contrary to the arguments in the Brief in Opposition, the Privileges and Immunities argument was raised both in the Appellate Division, *see,* Add. 3-4, and in the Court of Appeals, *see,* Add. 1-2. It was also discussed in oral argument in both cases.

The Brief in Opposition is also incorrect in its assertion that the Court of Appeals decision suggested neither New Yorkers nor Louisiana citizens could enforce a Louisiana judgment against the State of Louisiana. Brief in Opp. at 18. To the contrary, the decision below expressly held that "there is no compelling interest in providing New York as a forum

for addressing this case" and that "the rights of New Yorkers are not involved in this matter at all." 6a. It is undisputable that the New York Court of Appeals was operating under the misunderstanding that the Privileges and Immunities Clause would allow it to enforce final judgments in favor of New Yorkers differently from the enforcement of final judgments in favor of Louisiana citizens.

That approach is contrary to the constitutional command that "citizens of each state shall be placed on the same footing as citizens of other states." *Lunding v. New York Tax Appeals, Tribunal*, 552 U.S. 287, 296 (1998) "any policy the State may choose to adopt must operate in the same way as its own citizens and those of other states." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907). *See, also*, Petition at 27-30.

4. There is No Basis in the Concept of Sovereign Immunity to Deny Enforcement of the Louisiana Judgment

While the Court of Appeals did not rely on Louisiana sovereign immunity to support its decision on the Brief in Opposition, it spends much of its argument asserting that denial of enforcement is justified on that ground alone. The argument is in error under Louisiana law, the rulings of this Court and New York law.

As a matter of Louisiana constitutional law, the waiver of sovereign immunity contained in Article XII, Section 10(A) of the Louisiana Constitution is an unequivocal rejection of the doctrine of sovereign immunity. *Jones v. Baton Rouge-Parish of East Baton Rouge*, 388 So.2d 737, 740 (La. 1980), the limitation on enforcement in Article XII, Section 10(C) is not a restriction or limitation on the sovereign immunity waiver, but governs the "method of payment" only.

Holly & Smith Architects, Inc. v. St. Helena Congregate Facility Inc. and St. Helena Parish Hospital, 943 So. 2d 1037, 1045-1046 (La. 2006). *See, also*, Petition at 19-21.[2]

Deference to Louisiana's sovereign immunity is not required by the decisions of this Court. *See, Nevada v. Hall*, 440 U.S. 410 (1979). Nor would New York recognize Louisiana's claim of sovereign immunity in its courts. *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980); *Deutsche Bank Sec., Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 72 (2006).

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[2] The Brief in Opposition also cites La. Rev. Stat. §13:5106 (E) (2008). However, that provision, which puts certain recovery caps per individual on claims against the state, was passed long after the commencement of the underlying lawsuit. In all events, there are no limitations in that section that have any bearing on this case.

CONCLUSION

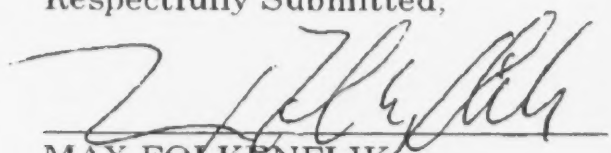
There has never been any doubt that the rule of law is undermined "if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In this case, the remedy has been abrogated by the New York Court of Appeals by an inappropriately parochial approach which focused on the rights of New York citizens, with too little regard for the constitutional rights of Louisiana citizens which *all states* are required to recognize and enforce.

The clear disregard by the New York Court of Appeals of the Constitutional requirements of Full Faith and Credit recognition and equal application of all Privileges and Immunities are more than enough reason to grant *certiorari* and reverse in this case. The ruling below perpetuates a grave injustice by continuing to deny compensation to 1,286 victims of a

flood caused by Louisiana's negligence in 1983 for which the State has been found liable in a final judgment. That fact makes the need for this Court's review even more compelling.

Dated: New York, New York
June 19, 2009

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ADDENDUM

To Be Argued By:
MAX FOLKENFLIK
Time Requested: 30 Minutes

New York County Clerk's Index No. 111287/06

COURT OF APPEALS
STATE OF NEW YORK

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Plaintiffs-Appellants,

—against—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Respondents.

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* * *

The fact that such a New York judgment against the state of Louisiana was entered on behalf of citizens of Louisiana, rather than citizens of New York, would not be a basis to deny enforcement. To deny enforcement of a New York judgment held by Louisiana citizens, while enforcing such judgments if held by New York citizens, would transgress the Privileges and Immunities Clause of the United States Constitution. U.S. Constitution, Article IV Section 2.[14]

CONCLUSION

This Court is faced with a choice where it must either respect the final judgment of the Louisiana Courts, or cede complete control over enforcement in New York to the Louisiana legislature. Only one of those choices respects the rule of law and the law of New York. The Louisiana Judgment should be enforced.

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[14] Article IV, § 2 of the United States Constitution provides:

> Sec. 2, Cl 1. Privileges and immunities of citizens.
>
> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. Art. IV, § 2, Cl 1

The object of the Privileges and Immunities Clause is to "place[ ] the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (U.S. 1998) *citing, Paul v. Virginia*, 75 U.S. 168, 8 Wall. 168, 180. 19 L. Ed. 357 (1869).

Add. 3

To Be Argued By:
MAX FOLKENFLIK

New York County Clerk's Index No. 111287/06

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

JEAN BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River,

Plaintiffs-Appellants,

—against—

THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Respondents.

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* * *

Defendant urges is intensely factual. Any number of separate Federal constitutional provisions are implicated, including Article IV, Section 1, the Full Faith and Credit Clause, Article IV Section 2, the Privileges and Immunities Clause, the 14th Amendment right to Due Process of Law, as well as the statutory construction of Article 54 of the C.P.L.R. While this Court need not reach the merits to dispose of this appeal, should it do so, the IAS court and Defendant are simply wrong on the merits.

Article 54, however, requires no showing of likelihood of success on the merits to effectuate the registration of a foreign judgment. "Sister-State judgments are presumed valid and are entitled to prima facie recognition . . ." *Overmyer v. Eliot Realty*, 83 Misc. 2d 694, 705 (Sup. Ct. Westchester 1975). *Accord*, *Baker by Thomas v. GMC*, 522 U.S. 222, 233 (1998) (final judgment by a court with jurisdiction "qualifies for recognition throughout the land.").

Article 54 does not require, or even allow, the clerk to scour the law of the rendering state looking for statutory provisions such as those here at issue before registration is granted. Registration is ministerial and performed by the clerk without judicial intervention. But for the fortuity that there were certain non-substantive irregularities with respect to the Louisiana Judgment which required correction to

* * *